"7. That the court erred in holding that the different options or agreements under which the mines were admitted to be sold, were separate and distinct transactions, each taking place at the termination of the other.

"8. That the court erred in holding that the contract under which the mines were ultimately sold was not an extension of the original contract made with Chapin.

"9. That the court erred in not holding that appellee's contract with Chapin was for services already fully performed, the benefit of which Chapin's estate received; and that in consequence Chapin's estate was indebted to appellee for the amount of which judgment was rendered in the lower court"

Argument.

The first four assignments of error could probably have been consolidated into one, and for that reason we will discuss them together and not separately.

The finding of the Supreme Court of Arizona is conclusive of the fact that none of the evidence given at the trial of the case in the District Court was preserved and carried to the Supreme Court of Arizona, except that contained in the bill of exceptions. The finding of the Supreme Court of Arizona is also conclusive of the fact that this bill of exceptions did not state that it contained all the evidence which was introduced upon the trial of the case in the District Court, nor upon the points presented to the Supreme Court of Arizona for its decision. The finding of the Supreme Court of Arizona is also conclusive of the fact that it does not "otherwise appear from the record in the case that all of the evidence which was introduced upon the trial of the case in the District Court was before the said Supreme Court of Arizona" (Transcript of Record, pp. 71-72).

The Supreme Court of Arizona erred in reviewing the case upon the evidence and reversing the judgment in the ab-

sence of a showing that all of the evidence in the case was before it.

> "In this case there is nothing whatever in the bill of exceptions to show that the evidence contained therein is all the evidence that was given on the trial, and we can not presume for the purpose of reversing the judgment, that there was no evidence given upon which the jury might rightfully have found the verdict which they did."

U. S. vs. Copper Queen Consolidated Mining Co., 185 U. S., 495; 46 Law, Ed., p. 1008.
Russell vs. Ely, 2d Black, 575, L. Ed., Vol. 17, p. 258.
Gardner, Treasurer, vs. Babcock, 3d Wallace, 240, Law Ed., Vol. 8, p. 31.
Texas Pacific R. Co. vs. Cox, 145 U. S., 593, Law Ed., 36, p. 829.

Statements of fact must affirmatively show that they contain all the evidence, and bills of exception must likewise show that they contain all the evidence necessary to determine the point in controversy.

> "In short, every matter not otherwise made, by statute, a matter of record, must be made so by a statement of facts or bill of exceptions, if we are required to review such matter."

Putnam vs. Putnam, 3 Arizona, 182, reported in Vol. 24, Pacific Reporter, page 320, as Southerland vs Putnam.

> "If the paper is to be considered as a statement of facts, it should state that it contains all the facts admitted, and the evidence admitted to have been proven, and the evidence of the facts disputed. No such state-

ment is contained therein. We conclude this is not good as a statement of fact."

Territory vs. Flores, 3 Ariz., page 215, 77 Pacific, p. 491.

This last case considers a document to ascertain whether or not it is a bill of exceptions or statement of facts, or either. These rules of law are recognized in other Arizona decisions, noticeably Paul vs. Cullom, Second Arizona, p. 16; 8 Pacific, p. 187; Evans vs. Glenecross, 4 Ariz., 222; 36 Pacific, 212.

The statutes of Arizona provide that the evidence taken in a trial of a case be made a part of the record by a statement of fact or by bill of exceptions, and further provide that

"The bill of exceptions may contain all the evidence, or so much thereof as may be necessary to explain the exceptions, and if all the evidence, or sufficient thereof to explain the exceptions, is contained in the bill of exceptions, no statement of fact shall be necessary."

Statutes of Arizona, year 1901, page 458, Par. 1460.
Statutes of Arizona, year 1901, page 458, Par. 1459.

The converse is, no doubt, true that a statement of fact shall be necessary in case the bill of exceptions does not contain all the evidence, or sufficient thereof to explain the exceptions.

Where the bill of exceptions does not purport to give all the evidence, the proof will have been presumed to have been supplied unless the error is affirmatively shown.

Evans vs. Glenecross, *supra*, 4th Ariz., 222.

"When the statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the verdict is not sustained by the evidence."

Paul vs. Cullom, *supra,* Second Ariz., p. 16.
Territory vs. Clanton, 3 Ariz., p. 1, 20 Pacific, p. 94.

"As the applicant, however, has omitted to preserve the evidence in this regard, and as it is not before us, we must assume in any event that this evidence was sufficient to sustain the finding of the court that a proper location notice has been duly filed and recorded."

Score vs. Griffin (Ariz.), 80 Pacific, p. 331.

"Where the record does not affirmatively purport to contain all the evidence, a state of facts will be presumed proved in the trial court authorizing the rulings, verdict and judgment."

Ency. Pleading and Practice, Vol. 2, p. 441.

This quotation from the Encyclopedia of Pleading and Practice cites, in its support, from one to twenty-five cases in each of the following States: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, and Wisconsin.

"The findings of fact by the trial court are presumptively correct, and if the record on appeal does not contain all the evidence, the appellate court will not review them. It will be presumed that sufficient evidence to support the findings was legally admitted."

Ency. Pleading and Practice, Vol. 2, page 486.

This quotation from the Ency. of Pleading and Practice cites, in support of it, from one to thirty cases from the following States: Alabama, Arkansas, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Washington and Wisconsin.

> "Where the evidence is not all in the record, its sufficiency can not be reviewed."

American Digest, Century Edition, Vol. 3, Col. 680, Sec. 2911, citing from one to fifty or more cases from the States of Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia and Wisconsin.

> "The sufficiency of the evidence can not be considered on appeal where the record does not affirmatively show show that it contains all the evidence."
>
> American Digest, Century Ed., Vol. 3, Col. 702, Section 2916.

This quotation from the American Digest citing from one to fifty or more cases from Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska,

Nevada, New York, Ohio, Oregon, South Dakota, Tennessee, West Virginia and Wisconsin.

Texas Pacific R. Co. vs. Cox, *supra,* 145 U. S., 593, 36 L. Ed., 829.
Hansen vs. Boyd, 161 U. S., 397, 40 L. Ed., 747.
Eliotts Appellate Procedure Digest, 773-4, Section 823.

This refusal of courts to review the findings of the lower court unless the record affirmatively shows that it contains all the evidence in the case, or all of the evidence bearing upon the findings, is so well established, and upon such sound reasoning, that it can not be presumed that a court of the standing and dignity of the Supreme Court of the Territory of Arizona, would disregard it. We feel confident that the Supreme Court of the Territory of Arizona did not intend to disregard it, but was misled into the belief that the record did affirmatively show that it contained all the evidence bearing upon the findings.

We think that part of the findings of the Arizona Supreme Court were intended to show that the said court had, when rendering its decision, been erroneously led into the belief that the bill of exceptions contained all the evidence, and that when two years after it was too late to correct its judgment, it discovered its error, and framed a finding to set forth the fact that its action was caused by a statement which it quotes, and which was contained in a paper that was not a record of the court, but which pretended to be an *ex parte* transcript of the record. The Supreme Court of Arizona, using language that could not be misunderstood, finds as a fact that "The only statements of fact in the record were contained in the foregoing findings of fact, and in a bill of exceptions. The said bill of exceptions, which was transmitted to the Supreme Court of Arizona with the record in this case, did not state that it contained all the

evidence which was introduced upon the trial of the case in the District Court, nor upon the points presented to the Arizona Supreme Court for its decision, nor does it otherwise appear from the record in the case that all the evidence which was introduced upon the trial of the case in the District Court was before the said Supreme Court of Arizona."

The court, continuing this finding, then finds that

> "The abstract of the transcript which contained the evidence stated that 'the defendant by his bill of exceptions which contained all the evidence taken on said trial, and which is as follows:' then follows the bill of exceptions, reciting the testimony of the different witnesses, covering some twenty-three pages," etc.
>
> Transcript of Record, page 71.

These latter facts thus found by the Arizona Supreme Court could under no circumstances have a place in this record unless they were introduced as an explanation for the reason the court erred in reversing the findings of the lower court.

The title "Abstract of the Transcript" is a misnomer. There is no such name for a document on appeal contained in the laws of Arizona, or the rules of its Supreme Court, but the rules of its Supreme Court provide for "an Abstract of Record." Rules of the Supreme Court of Arizona, approved March 20, 1903 (71 Pacific, VI).

The previous rules of the Arizona Supreme Court had also provided for an "Abstract of Record," and the document thus provided for is frequently called an Abstract of the Transcript. It is a document prepared by the attorney for the appellant for the convenience of himself and the Supreme Court, and its contents have no more binding force upon the court or opposite counsel than any statement contained in the counsels' brief.

Rules of the Supreme Court of Arizona (*supra*).

As shown by the foregoing findings of the Arizona Supreme Court, counsel for Appellee Trickey, in preparing his Abstract, caused to be inserted into it, just preceding the transcription of the "bill of exceptions," the statement that "the defendant by his bill of exceptions, which contained all the evidence taken on said trial." This statement the Arizona Supreme Court, in the first part of the findings above referred to, declares is not borne out by the record, but that on the contrary there is nothing in the record to show that it contains all the evidence which was introduced upon the trial of the case in the District Court.

Following the finding above referred to, the court further finds that the bill of exceptions was presented to the Judge of the District Court, and to Appellant Crowe's attorneys, and that the said attorneys made no objection thereto, "but that the record contains no certificate from the clerk or court that the evidence contained in the bill of exceptions constituted all of the evidence taken on the trial in the lower court, and that fact is controverted by the counsel for the appellee."

Transcript of Record, pages 71 and 72.

The presentation of the bill of exceptions to the opposite attorneys is provided for by our Statutes.

Revised Statutes of Arizona, year 1901, page 458, Paragraphs 1467-1468.

But there is no provision of law that this submission to the opposite attorneys waives any objection the attorneys may desire to make to it on the score that it does not contain all the evidence, nor is there any presumption or reason for holding that this submission to the opposite attorneys cures any such defect in a bill of exceptions. Were

it a statement of facts, there might be ground for such an argument. It is a settled rule of practice that bills of exception are presumed not to contain all the evidence.

> Grand Trunk Ry. Co. vs. Ives,, 144 U. S., 408, L. Ed. Vol. 36, page 485 (488).

"The rule which we have often stated is that this court will not disturb the findings of the district court as to the facts if there is any evidence fairly tending to support them."

> Abernathy vs. Reynolds, 71 Pacific, 914 (Ariz.)
> Curtis vs. Boquillas L. & C. Co., 71 Pac., 924 (Ariz.).
> Costello vs. Friedman, 71 Pacific, 937 (Ariz.).
> Edwards vs. Simms, 71 Pacific, 902 (Ariz.).
> Charoleau vs. Shields and Price, 76 Pacific, 821 (Ariz.).
> Score vs. Griffin, 80 Pacific, 331 (Ariz.).
> McCormick, *et al. vs.* Ariz. Central Bank, 52 Pacific, 469 (Ariz.).
> Weber vs. Kastner, 53 Pacific, 207 (Ariz.).
> Greene vs. Miller, 73 Pacific, 399 (Ariz.).
> White vs. Brash, 73 Pacific, 445 (Ariz.).
> Howard vs. Perrin, 76 Pacific, 460 (Ariz.).
> Ryder vs. Leach, 77 Pacific, 490 (Ariz.).
> Goldman vs. Sotello, 60 Pacific, 696 (Ariz.).

It will be seen from an examination of the dates upon which these decisions were rendered that it was not intended by the Supreme Court of Arizona that the case of Crowe vs. Trickey should change this rule, for the decisions in the first four cases just above cited were rendered upon the same date that the decision in the Crowe vs. Trickey case was rendered, viz.: The 20th day of March, 1903. The

fifth case (Charoleau vs. Shields and Price) was decided May 7, 1904, and the sixth case (Score vs. Griffin) was decided March 30, 1905. All, or nearly all, of the remaining cases were decided before the case of Crowe vs. Trickey.

From the foregoing authorities, we feel justified in arguing that there is no question but that it is the rule in Arizona that a bill of exceptions or statement of facts must affirmatively show that it contains all the evidence in the case, or the Supreme Court of Arizona will refuse to review the case upon questions of fact. It is apparent that the Supreme Court in this case did review the findings of the District Court, in the absence of a showing that all the evidence was before the Arizona Supreme Court; that it was led into believing all the evidence was before it by a statement of counsel for appellee Trickey that was not and could not be made a part of the record, so as to have any binding force or effect upon the court, and that the Arizona Supreme Court erred in reviewing or disturbing the findings of the District Court upon the record before it in this case.

Assignment of Error No. 5.

This assignment is directed to the action of the Supreme Court of Arizona in making findings of facts that had the effect to exclude from the case relevant evidence, which was contained in the bill of exceptions, and the larger part of which had been admitted by the District Court without any objection having been made to its admission. We can not find in the record any explanation of this action of the Arizona Supreme Court, and must conclude that in fact it also resulted from an oversight. The first conclusion of law of the Arizona Supreme Court contains the first of these objectionable findings. The conclusion is as follows:

"That the trial court erred in finding as a fact that plaintiff, Crowe, between the 8th day of February, 1898, and the 11th day of January, 1900, brought about a sale of Chapin's interest in the mine, because there was no evidence to sustain such finding."

Transcript of Record, page 73.

The objectionable finding is contained in the language: "because there was no evidence to sustain such finding."

The effect of this finding is to exclude from the case, not only the evidence not in the record, but also to exclude a large amount of positive evidence given by the witnesses in the case, and contained in the bill of exceptions, such as:

"Q. Mr. Crowe, what did you do toward bringing about the sale of the interest of Jerry Neville and N. H. Chapin in the Pride of the West mine? A. I secured the purchasers for the mine—Emerson Gee and A. R. Wilfley."

Transcript of Record, page 44.

"Mr. Crowe brought about the sale of the Pride of the West mine, and it was due to his efforts that the sale was effected."

Transcript of Record, page 46.

"Mr. Chapin agreed with Mr. Crowe that ten per cent was to be paid to Mr. Crowe for bringing about the sale."

Transcript of Record, page 47.

"I would not attempt to repeat all that was said at this conversation, but the proposition was made by Mr. Crowe and agreed to by Mr. Chapin, that he was

to receive ten per cent. of the amount of the sale price agreed upon."

Transcript of Record, page 47.

"I consider the services of Mr. Crowe in bringing about the sale of the Pride of the West mine worth the amount claimed for the Chapin and Neville interest and the amount he received from Olsen."

Transcript of Record, page 48.

"The plaintiff, George W. Crowe, knowing that a change in the terms of purchase was liable to be made, had an agreement with Norman H. Chapin, in the presence and hearing of myself on the dump of the Pride of the West Mine, on or about the 30th day of March, 1899, as follows: Mr. Crowe stated to Mr. Chapin and myself that in as much as the conditions of purchase were about to be changed, it was understood and agreed by and between Mr. Chapin (who also represented Neville) and the said Crowe that in any deal made with myself and Gee by him and Neville, that the said Crowe was to receive ten per cent, of any and all purchase money, as commission in negotiating the sale of their interest in the Pride of the West mine. In reply to this statement, Chapin stated to Crowe that that was his understanding; that the said Crowe was to have and receive ten per cent. of any and all purchase money to be received by him for their interest in the Pride of the West mine, as a commission for making the sale."

Transcript of Record, pages 49-50.

"George W. Crowe arranged and brought about the sale or option of the Pride of the West mine, as stated before."

Transcript of Record, page 50.

"The sale was perfected on the terms and conditions, as before stated, with permission to mine and ship ore by the payment of royalty. At the end of this year Chapin and Neville had died, and I made an agreement with the administrators to extend the time with the privilege of making partial payments. At the present time, $50,000.00 has been paid, leaving $50,000.00 still due. The only change from the original terms was an extension of time and partial payments and no Royalty."

Transcript of Record, page 51.

"I do not remember the exact words, but do remember that it was a clear understanding between Mr. Crowe and Mr. Chapin and myself that Crowe was to receive ten per cent commission on any money I might pay to Mr. Chapin."

Transcript of Record, page 51.

The foregoing extracts are taken from the evidence of appellant Crowe and two of his witnesses, viz.: Emerson Gee and A. R. Wilfley. The testimony of these two witnesses was given by deposition, and the last payment of $25,000.00 to the estates each of Neville and Chapin was made after the evidence in the depositions was given.

The evidence in the bill of exceptions also shows that immediately upon the consummation of the first agreement, Wilfley took possession, and up to the time of the trial of the case had continued in possession, constantly operating it.

"The mine has been operated steadily since we acquired possession of it, and is now being worked with a force of about fifty men. A mill and smelter have been erected, and are in operation steadily. Over a thousand feet of shafts, winzes, and up-raises have been driven in the mine. Tramways and roads have

been constructed, and the mine is now being equipped with a hoisting plant and machine drills."

Transcript of Record, page 47.

(See Transcript of Record, page 52.)

And appellee, Trickey, himself, testified as follows:

"Mr. Wilfley was in possession of the Pride of the West mine at the time I became administrator, and has been in possession ever since. Mr. Wilfley and the company have had possession right straight along. I knew, as everybody knew, that they had an option to purchase the mine and was working it, and a copy of the lease I found among the papers."

Transcript of Record, page 54.

As before suggested, most all of this evidence was admitted without objection, and it, and much more not quoted, is all a direct and positive refutation to the findings of the Arizona Supreme Court now being discussed. As a matter of fact, we can suppose that the Arizona Supreme Court made a mistake and overlooked this evidence; as a matter of law, there seems nothing left but to presume that the Supreme Court of Arizona excluded it.

The second conclusion of law of the Arizona Supreme Court made a similar objectionable finding. The conclusion is as follows:

"That said court erred in finding as a fact that the said A. R. Wilfley paid to the said defendant as such administrator, for the interest of the said Chapin, the sum of fifty thousand dollars ($50,000), as follows: April 7, 1900, $500.00; June 19, 1900, $4,500.00; September 19, 1900, $5,000.00; December 19, 1900, $5,000.00; March 25, 1901, $5,000.00; June 17, 1901,

$5,000.00; December 7, 1901, $5,000.00, because there was no evidence to sustain such finding."

Transcript of Record, page 73.

The bill of exceptions shows that the appellee Trickey at the trial of the case in open court, admitted the receipt of the said sums of $500.00, $4,500.00, $5,000.00, $5,000.00, $5,000.00, $5,000.00, and $25,000.00.

Transcript of Record, page 53.

The appellee, Trickey, himself, testifies that he received these sums as administrator.

Transcript of Record, page 53.

If the finding of the Supreme Court of Arizona is meant to indicate that Trickey received the said sums for the interest of the estate of Chapin, as distinguished from "for the interest of the said Chapin," then the numerous extracts from the evidence we have above quoted will show that there was evidence to sustain the findings of the district court, and that, while as a matter of fact the Arizona Supreme Court may have overlooked it, as a matter of law, it must be considered to have excluded it.

Assignments of Error VI, VII, VIII and IX.

An extension of time was given in which to file the findings of fact of the Supreme Court of Arizona in this case, and they were not filed until May 10, 1905. The assignments of error had to be filed on or before March 15, 1905. In consequence, they were made and filed before the findings

of fact, and could not and did not meet the findings as nearly as might be wished. As assignments of error 6, 7, 8, and 9 assert that the Supreme Court of Arizona erred in certain holdings on the evidence, this court will probably not consider them.

If this court could review all the evidence contained in the bill of exceptions, even though it does not contain all the evidence given at the trial, we believe it would find that it abundantly supports the findings of the District Court, and that the preponderance and weight of the evidence supports the findings of the District Court as against those of the Supreme Court.

We feel that the Supreme Court of the Territory of Arizona has erred in reviewing this case upon the facts, in reversing the judgment, and in ordering judgment entered for the appellee, and it is submitted that these errors of the Supreme Court of Arizona are apparent from the record. We ask that the judgment of the Supreme Court of Arizona be reversed.

Respectfully submitted,

W. C. KEEGIN,
Attorney for Appellant.

F. H. HEREFORD,
S. E. HAZZARD,
Of Counsel.

No. 71.

SUPREME COURT OF THE UNITED STATES

Office Supreme Court,
FILED.
NOV 5 1906
JAMES H. McKENN

GEORGE W. CROWE,
Appellant,

vs.

M. M. TRICKEY, Administrator of the Estate of Norman H. Chapin, Deceased,
Appellee.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF FOR APPELLEE

EUGENE S. IVES.
Counsel for Appellee

SUPREME COURT OF THE UNITED STATES

GEORGE W. CROWE,

Appellant,

vs.

M. M. TRICKEY, Administrator of the Estate of Norman H. Chapin, Deceased,

Appellee.

STATEMENT OF FACTS.

Previous to March, 1900, a mine called the "Pride of the West," situated in Santa Cruz County, Territory of Arizona, was owned by three parties, one Olsen owning one-half thereof, and N. H. Chapin and Jerry Neville each owning one-fourth thereof.

In March, 1889, the appellant Crowe brought this mine to the attention of one Emerson Gee and one A. R. Wilfley, and in the latter part of that month Wilfley purchased Olesen's one-half interest, and entered into an agreement with Chapin and Neville by which he was granted an optional right to purchase their one-half interest, and pursuant thereto a deed to such one-half interest was executed by Chapin and Neville, and placed in escrow, the terms of the escrow agreement providing that the deed should be delivered to Wilfley upon payment by him of the sum of $100,000 in cash on or before April 1st, 1900.

It was verbally agreed prior to the execution of the deed and escrow agreement above mentioned, between Crowe and Chapin, representing himself and Neville, that Crowe was to receive ten per cent of the purchase money received by them for their interest in the mine, as commission for making the sale.

Prior to April 1, 1900, Chapin and Neville

both died, and M. M. Trickey was duly appointed administrator of Chapin's estate, and one Henry Harmon of Neville's estate.

Wilfley failed to pay the money and take up the property under the option, and after the 1st day of April, 1900, when such option lapsed, the deed which had been placed in escrow, was, in pursuance of the escrow instructions, returnedto Trickey as administrator of Chapin's estate.

Thereupon negotiations were entered into between the administrators and Wilfley, and on April 7, 1900, upon the payment of $1,000 by Wilfley, the administrators of the two estates made another agreement with Wilfley by which they gave him an option to purchase the interest owned by the two estates, on certain terms and conditions, for the sum of $100,000. This option also lapsed.

After the lapsing of the last mentioned option, negotiations were again opened between Wilfley and the administrators, and on the 19th day of June, 1900, each of the administrators entered into an agreement with Wilfley by the terms of which each administrator gave an option to Wilfley to purchase the one-fourth interest owned by his intestate, and obligated himself to execute to Wilfley a deed for such interest upon the payment of $50,000 in instalments as follows:

$5,000 within three months;
$5,000 within six months;
$5,000 within twelve months; and

$25,000 within eighteen months.

The appellant Crowe had nothing whatever to do with either of the last mentioned options, or with the sale of the property after the death of Chapin.

Pursuant to the last mentioned options, Wilfley paid to each of the administrators the sum of $,5000 in cash on the 19th day of June, 1900, and the following sums on the following dates respectively:

$5,000 on September 19, 1900;

$5,000 on December 19, 1900;

$5,000 on March 20, 1901;

$5,000 on June 17, 1901; and

$25,000 on December 7, 1901.

Upon the payment of the full amount of $50,000 to each of the administrators above mentioned, each administrator conveyed the interest of his intestate to soid Wilfley.

On December 10, 1900, Crowe presented to each of the administrators, in accordance with the laws of the Territory of Arizona, a claim against each of the said estates for ten per cent of the purchase price of said property, being the sum of $5,000 in each claim, claiming the same as commissions for bringing about the sale to Wilfley.

Each administrator rejected the claim pre-

sented to him, whereupon Crowe brought action in the District Court of Santa Cruz County on January 25th, 1901, against each administrator to recover the sum of $5,000. Each of the estates was solvent and able to pay that amount, and no part of the $5,000 has ever been paid.

All of the agreements above mentioned, and particularly the last mentioned agreements between the administrators and Wilfley, under which purchase was finally made, were only options to purchase, and there was no obligation on the part of Wilfley to take the property or pay any portion of the purchase price, and no obligation on the part of either of the administrators to convey the interests of the intestates until the full purchase price had been paid.

The sale of the property that that was actually effected was the result of negotiations between Wilfley and the respective administrators, and Crowe rendered no services to either of the administrators, and took no part in the ultimate sale of the property.

The District Court gave judgment for Crowe for the amount claimed, from which judgment the respective administrators appealed to the Supreme Court of the Territory of Arizona, and that Court reversed the judgment of the District Court and remanded the causes, with direction in each that judgment be entered for the administrators.

From this judgment of the Supreme Court

of the Territory, Crowe prosecutes an appeal to this Court.

(Statement of Facts found by Supreme Court, Transcript of Record pages 66 to 73, folios 136 to 150.)

ARGUMENT.

I.

The first four assignments of error are to the effect that the Supreme Court of the Territory erred in considering the sufficiency of the evidence to sustain the judgment, for the reason as claimed, that the bill of exceptions does not purport to contain all of the evidence, and the greater part of appellant's argument is devoted to this proposition.

To this there are two answers:

First: That it does sufficiently appear from the record that all the evidence upon which judgment of the trial Court was based, was before the Supreme Court of the Territory.

Second: That no such question can be considered by this Court on appeal from the judgment of the Supreme Court of a Territory.

It is not disputed that the ordinary rule is that to review a decision upon a question of

conflict of evidence all of the evidence upon which that decision was based must be before the reviewing tribunal, and that it must so affirmatively appear from the record. When a decision upon a question of fact is to be reviewed upon a conflict of evidence, by a Court authorized to make such review, it must necessarily appear either by the certificates of the Judge, or some other form of authentication, that all the evidence bearing upon the subject decided is contained in the record presented for consideration. To this effect are the multitude of authorities cited and referred to in appellant's brief, and as applied to the ordinary case involving a decision of a question of fact upon conflict of evidence, or the propriety of directing a verdict, they are undoubtedly correct, But it is not essential that the certificate to the bill of exceptions shall state in so many words that all the evidence is contained therein, in order that the sufficiency of the evidence may be considered, if it appears otherwise from the record that all the evidence is actually before the Court.

The rule laid down in the cases cited by appellant is for the benefit of the Appellate Court, and designed to relieve the Court of the embarrassment of attempting to pass upon a question of fact, or the sufficiency of the evidence to sustain a finding of fact, without certainty that it has all of the evidence before it. Where the reason of the rule fails, the rule itself will not be applied, as in a case where the error claimed is the direction of a verdict for one party, and there is evidence in the bill which will warrant a verdict for the other.

Leslie v. Standard Sewing Machine Co., 98 Fed. 827.

So where the record, taken as a whole,, shows that all the evidence is before the Court, the reason of the rule likewise falls and the rule itself falls with it It is not the mere form of the certificate to the bill of exceptions, but the whole record that controls; and, if the record, taken as a whole, shows that the bill in fact contains all the evidence, it will be so considered, and a Court authorized to pass upon such matters will inquire upon the record as to the correctness of the decision sought to be reviewed.

Gunnison Co. v. Rollins, 173 U. S. 255.

Spangler v. Green, 21 Colo. 505, 42 Pac. 674.

Tested by the rule laid down in these cases, this record amply shows that all the evidence was before the Supreme Court of the Territory.

The bill of exceptions starts with the testimony of Crowe himself, contains his testimony upon examination and cross-examination; contains also the testimony of Gee and Wilfley; and then follows the statement "Plaintiff rested." Then follows the testimony of the administrator in his own behalf.

Within the ruling of this Court in Gunnison County v. Rollins, supra, this alone is sufficient to show that all of the evidence, at least

on behalf of the plaintiff, is contained in the bill of exceptions; but, in addition, the minute entries of the trial Court kept by its Clerk and constituting a part of the record (Transcript of Record, page 20), after setting forth some matters not here material, proceed as follows:

"The plaintiff, to maintain upon his part the issues herein, introduced certain documentary evidence, and also called as a witness the following named person, to-wit: George W. Crowe, the plaintiff, who was duly sworn, examined and cross-examined, and thereupon the plaintiff rested his case. The defendant to maintain upon his part the issues herein, called as a witness the following named person, to-wit: M. M. Trickey, who was duly sworn, examined and cross-examined; and thereupon the defendant rested his case. The evidence being now adduced and the case closed, arguments of the respective counsel followed, and the cause being now fully submitted ,the same was by the Court taken under advisement."

Paragraph 1485 of the Revised Statutes of Arizona, 1901, provides:

> "Every paper filed in a case shall constitute a part of the record of the case, including depositions and all written evidence and exhibits offered or admitted in evidence; and no papers thus filed or admitted in evidence or offered in evidence and rejected by the Court need be incorporated in a statement of facts in order to make it a part of the record."

Paragraph 1582 of said Revised Statutes provides:

> "On taking an appeal * * * * the appellant * * * * shall cause to be filed in the Supreme Court * * * * the original record of the case, together with a copy of all minute entries made in the case, the same to be certified to by the Clerk of the District Court, with the seal of the Court affixed that it contains a true copy of all minute entries made in the case, and that the papers thereunto attached are all the papers constituting the record of the case."

The Clerk, in compliance with this statute, transmitted all of the original records and copies of the minute entries to the Supreme Court, (p. 21, fol. 43). Therefore all documentary evidence was necessarily before the Supreme Court.

The original depositions of Wilfley and Gee, which were reduced to narrative form in the bill of exceptions, were before the Supreme Court and are now in the printed transcript of this Court (pages 22 and 31).

The minute entries show that only two witnesses were called and examined before the Judge, the plaintiff and Trickey, the administrator. The bill of exceptions contains the evidence of both the plaintiff and Trickey in narrative form. All the evidence adduced before the District Court must, therefore, have

been before the Supreme Court, unless a portion of the testimony of the plaintiff or of Trickey was omitted from the bill of exceptions.

Moreover, the inherent character of the evidence itself shows that it is all contained in the bill of exceptions. The whole controversy centered about the agreement made with Chapin, representing himself and Neville, on the one hand, and Wilfley on the other, and what was subsequently done under this agreement, and the agreement for commission between Chapin and Crowe.

Every person present at any of these negotiations was examined, and testified as to what took place, and the evidence relating to the subject was substantially without conflict. Looking at the bill of exceptions itself without reference to certificates, or other parts of the record, it can be readily seen that all the evidence possible to have been produced is contained therein.

Crowe and the two witnesses, whose depositions were introduced (Wilfley and Gee) testified to certain conversations and certain facts which are claimed to constitute proof of the cause of action alleged. All testified that they were the only persons present aside from those now deceased, at any of the negotiations or transactions involved, and all testified under the stimulus of an interest, Crowe and Wilfley testifying that Wilfley and his associates were interested in Crowe's commission and entitled to a part of it if recovered in this ac-

tion (Transcript of Record, page 52, folio 108; also page 45, folio 94).

It thus appears that Crowe and his two witnesses testified that they were the only persons except the deceased Chapin, who were present at an yof the transactions or conversations. Their testimony, as shown in the record, purports to be a complete statement of all that occurred or was said at any time bearing upon the issues involved, and is of such a character as to negative any suggestion that there might have been anything else said or done at such times by any other person present. Trickey was not present, and it would have been impossible for Trickey to have given any testimony which would have conflicted with the testimony offered by the plaintiff. Therefore, to presume that there might have been adduced upon the trial other material testimony would require the violent presumption that the plaintiff himself, in other and undisclosed portions of his testimony, completely contradicted his testimony and that of his own two witnesses, as it appears in the bill of exceptions.

Such evidently was the view taken by the Supreme Court of the Territory when it considered the evidence, and held that the conclusions which the District Court drew from it were entirely unwarranted. The case presented to the Supreme Court was not an ordinary case where it was claimed that an erroneous finding was made upon conflicting testimony, but simply a question whether from the uncontradicted testimony, the inferences of fact and law drawn by the District Judge were correct.

II.

The Supreme Court of the Territory, evidently intending to comply with the statute requiring that instead of evidence at large a statement of the facts in the nature of a special verdict shall be made and transmited to this Court, prepared the statement found on pages 66 to 73 of the record, folios 136 to 150.

It has inserted in the statement of facts (pages 69, 70 and 71 of the record) the entire findings made by the District Judge and certain statements as to the contents of the record.

It needs no argument to show that such matters are properly no part of the statement of facts required to be furnished to this Court. They are as out of place in such a statement as would be the pleadings if set forth in full in the findings of the District Judge. They must be regarded as superfluous and disregarded as findings of fact. The statement of facts in the nature of a special verdict should consist of a succinct statement of all the facts which the Supreme Court deemed established in the case and upon which it based its legal conclusion, and nothing more. To insert in such statement of facts a part of the record itself or the Court's conclusion as to the bill of exceptions, would be as improper as such matters would be in a special verdict, if one had been rendered. Eliminating these superfluous matters therefrom, a complete and sufficient statement of facts will be found in the record, though in a somewhat confusing form and with some repe-

titions, and it is the claim of the appellee that upon these facts alone, as found by the Supreme Court, the correctness of the judgment of the Supréme Court of the Territory must be determined.

Nothing is better settled than that the power of this Court upon appeal from a judgment of the Supreme Court of a Territory, in a case not tried by a jury, is limited to determining whether the facts found by the Supreme Court sustain its judgment, and whether there is error in the admission or rejection of evidence.

Holloway v. Dunham, 170 U. S., 615.

Karrick v. Hannaman, 168 U. S., 328.

Harrison v. Perea, 168 U. S., 311.

Young v. Amy, 171 U. S., 179.

No questions of the rejection or admission of evidence are presented in this case, as no evidence was rejected that was sought to be introduced by the plaintiff. The errors in the admission or rejection of evidence which this Court is authorized to review are, of course, those alleged to have been committed at the trial. The appellate court neither admits nor rejects evidence, and its consideration of the sufficiency of the evidence against objection is not the admission of evidence within the meaning of the authorities above cited.

The power of the Court, therefore, in re-

viewing this case must be limited to the question whether the facts as found by the Supreme Court of the Territory warrant its conclusion and the judgment based thereon. Had the certificate to the bill of exceptions stated that all the evidence was contained therein, and the Supreme Court found facts as it has, and the evidence was wholly insufficient to sustain the findings of fact, or if such findings were entirely contrary to undisputed evidence, this Court, however much it might regret its inability to do so, would be powerless to go behind the findings and find new facts or determine the sufficiency of the evidence to sustain those found by the Supreme Court of the Territory.

Young v. Amy, 170 U. S., 179.

The rule is repeatedly and consistently asserted by this Court that, except for the purpose of reviewing alleged errors in the admission or rejection of evidence, it is limited to a consideration of the facts found by the Territorial Supreme Court, and cannot look behind such findings either for the purpose of determining the sufficiency of the evidence to sustain them, or the propriety of considering any evidence not subsequently made the basis of an assignment of error as to its admission or rejection. Within the rule established by the authorities above cited and by the unbroken line of decisions of this Court in such appeals, the facts found by the Supreme Court of the Territory must be taken as true, and from them must be determined the correctness of the judgment appealed from, regardless of the

state of the evidence or of the record containing it.

III.

The following findings of the Supreme Court are deemed conclusive against the plaintiff's claim:

> "That the sale of the property that was subsequently affected was the result of the negotiations between Trickey, the administrator of Chapin's estate, and Wilfley; that before the date of the sale Crowe's power or authority to act in the matter had been terminated, and his agency revoked by the death of Chapin."
>
> "That in regard to the latter negotiations, Crowe rendered no services to Trickey, received no appointment or agreement from Trickey in reference to the matter, and took no part whatever in the ultimate sale."
>
> (Page 72, folio 147.)

The Supreme Court, in its opinion, commenting upon this fact, said:

> "The sale that was subsequently affected was the result of the negotiations between Trickey, the administrator of Chapin's estate, and Wilfley. Crowe's power or authority to act in this matter had, before the date of

this transaction, been terminated and his agency revoked by the death of Chapin, and he could have no further right or interest therein by virtue of the agreement of March, 1899, between him and Chapin.

There is no claim on his part that he was consulted by either the vendor or vendee in the latter negotiations, He rendered no service to Trickey, received no appointment or agreement from Trickey in reference to the matter, and the fact that his former efforts to effect the sale, while he failed in its completion, might have tended to assist Trickey in perfecting it, or might have, to a great extent, rendered possible the consummation of such sale will not suffice to establish a claim on his part against the estate of Chapin for commission on a sale that Trickey accomplished without his service."

(Page 65, folio 131-2.)

Upon the facts as found Crowe did not earn his commissions and is not entitled to recover, for the following reasons:

First: The escrow agreement executed in pursuance of Crowe's efforts was an option, and he was not entitled to any commissions by reason thereof, except upon the contingency that the purchaser whom he had secured should avail himslef of such option.

The principle is that, if the purchaser is absolutely bound and is accepted by the seller, the broker has earned his commissions; but, i fthe purchaser has the right to withdraw and forfeit his earnest money, and does withdraw, the broker is not entitled to his commissions.

If the vendor has the right, either to declare a forfeiture in case of the default of the purchaser upon deferred payments, or to proceed against a purchaser upon deferred payments, then the broker has earned his commissions, even though the vendor should elect to declare the forfeiture. But, the essential foundation of the earning of commissions by the broker, is the fact that he has secured a purchaser who has either bought or obligated himself to buy the property and pay for it, and unless such obligation exist, there is no sale and no earning of commissions. This principle is recognized by the authorities of all States.

Kimberly v. Henderson, 29 Md., 512;

Ramsey v. West, 31 Mo. App., 676;

Zeidler v. Walker, 41 Mo. App., 118;

Levy v. Kottman, 32 N. Y. S., 241;

Jenkins v. Hollingsworth, 83 Ill. App. 139.

Brackenridge v. Claridge, 44 S. W., 819.

Therefore, upon the death of Chapin and

Neville, Crowe had a contingent right to his commissions, dependent upon Wilfley's availing himself of the option and paying $100,000 before the 1st of April, 1900. When Wilfley failed to make this payment the contract which had been negotiated by Crowe fell through, and his right to commissions fell with it.

Second: There is a line of authorities which hold that when a broker has procured a purchaser and introduces him to his employer, the vendor, the broker may recover his commissions if subsequently the vendor sells to the purchaser so secured by the broker, even upon somewhat different terms from those which had been discussed between the vendor and the broker.

These authorities, however, rest absolutely upon the principle that the contract between the principal and agent was a continuing one, and was in existence at the time when the final deal was consummated. The principal may at any time, if acting in good faith terminate the contract with the proker and revoke his authority and if before any deal should be consummated the principal should so revoke the authority of the broker, then the broker would have no right to commissions by reason of any sale thereafter consummated by the principal.

The only restriction upon the right of the principal to revoke is that the revocation must be in good faith, and whether it was made in good faith, or was a mere device to defraud the broker of his commissions, is a question of fact,

and the broker in any litigation would have the right to have such question of fact submitted to the jury

It is confidently submitted that in all cases where the principal has revoked the contract before the broker has earned his commissions, the broker's right to commissions is absolutely cut off, except where it has been found as a fact that such revocation was a mere device to defraud the broker of his right to commissions.

Sibbald v. Beth. Iron Co., 83 N. Y., 378

Beal v. Creswell, 3 Md., 196.

Zeimer v. Antisel, 17 P., 642.

Armstrong v. Wann, 12 N. W., 345.

Satterthwait v. Vreeland, 48 How. Pr. 508.

Carlson v. Nathan, 43 Ill. App., 364.

Buehler v. Weiffenbach, 46 N. Y. S., 861.

O'Toole v. Tucker, 40 N. Y. S., 695.

Pryor v. Jolly, 40 S. W. 959, reversing the same case reported 39 S. W., 1019.

Antisdell v. Camfield, 77 N. W., 944.

Third: The right of the principal to re-

voke is absolute. The language of the Court in Sibbald v. Bethlehem Iron Co., supra, at page 384, upon this subject, is as follows:

> "Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith * * * * * The right of the principal to terminate his authority is absolute and unrestricted, except only that he must only do it in good faith and not as a mere device to escape the payment of the broker's commissions."

The interest arising from commissions is not such an interest as will render the authority irrevocable.

Stier v. Imp. Life Ins. Co., 58 F., 843;

Barr v. Schroeder ,32 Cal., 609;

Chambers v. Seay, 73 Ala., 372.

An interest in the proceeds does not render the authority irrevocable.

Hamilton v. Frothingham, 58 Mich., 253;

Greene v. Cole, 103 Mo., 70;

Coffin v. Landis, 46 Pa. St., 426.

Shisler's estate, infra.

Fourth: It is a well established rule of the common law that the death of the principal puts an end to the agency when the authority is not coupled with an interest.

1 Am. and Eng. Enc. of Law, 1223.

Boone v. Clark, 3 Cranch, 389.

> "To constitute a power, coupled with an interest and property in the thing itself, the subject of the agency or power must be vested in the person to whom the agency or power is given."

In the language of Chief Justice Marshall, "The power must be engrafted on an estate in the thing."

Hunt vs. Rousmanier, 8 Wheaton, 174.

Thus an interest arising from commissions or the proceeds of a transaction, is not an interest which will prevent revocation.

Walker v. Walker, 125 U. S. 339, and cases cited, supra.

That death revokes the agency in the case of principal and broker has been directly held in Shisler's Est., 2 Pa. Dis. Reps., 588, and in Scruggs v. Driver, 31 Ala., 274.

Upon the death of Chapin and Neville, Crowe ceased to be a broker, and had no rights

except as has been said upon the contingency of Wilfley availing himself of the escrow agreement of April 1, 1900.

V.

The case of Pryor v. Jolly, supra, is directly in point. In that case the vendor agreed that if a purchaser "takes 1,500 head of cattle at $17 per head cash" he would pay the broker who had procured the purchaser a commission of $1 per head. The purchaser took the cattle and paid $8,500 in cash, and the balance in a promissory note due four and one-half months after date, with interest at the rate of ten per cent, the note to be guaranteed by the State National Bank, Denver, Colo., by telegram or letter.

The court held, that the contract to pay the broker his commission was contingent upon all cash being paid; although the trade as consummated was substantially a cash trade, it was not an absolute compliance with the contingency, and that the broker was not entitled to recover.

VI.

Crowe has no equities in this case. Wilfley the purchaser, was co-owner with Chapin and Neville, having already acquired a one-half interest in the mine from Olsen.

Plainly, if Wilfley had not availed himself of the option of the escrow agreement, Crowe would have had no claim to recovery.

The contention that after the expiration of such option the administrators might never sell the property to Wilfley, who already owned one-half of it, without subjecting themselves to a liability to pay Crowe ten per cent of any price which Wilfley might pay them for the mine, would be to deprive the administrators from making a sale to the natural and probable purchaser of their property. This contention is forcibly disposed of by the learned judge who rendered the decision in the case of Sibbald v. Bethelehem Iron Co., in the following language:

> "The logical result of such a doctrine would be to prevent the defendant from ever making a sale of steel rails to the Grand Trunk Railway, except on condition of paying a commission to the plaintiff. . * . . * . . * There could be no sale thereafter which would not be as much due to such original act of the broker as the one in question.
>
> "It can always be said with equal truth that the Iron Company was availing itself of the fruits of the broker's labor. The doctrine asserted permits a recovery for unsuccessful efforts, for trying to effect an agreement without accomplishing one, for merely asking a purchaser to buy without getting his assent."

Chapin's contract could never go further than an agreement to pay the broker for pro-

curing a purchaser upon a price and terms to which he (Chapin) would assent. Chapin's terms were embodied in the escrow agreement.

It can not be assumed that Chapin would ever have assented to the agreement which the administrator made.

Chapin's estate can only be bound by Chapin's contract, and his contract can only be of binding effect upon proof that his mind assented to the terms of a trade which was consummated. Of this, there is no evidence whatever.

VII.

The testimony of the plaintiff and his witnesses is that Wilfley and Gee were to receive two thirds of Crowe's commissions (Transcript of Record pages 45 and 52).

Against the contention of the defendant the Court has found that Chapin and Neville agreed to pay Crowe a commission. By force of such agreement Crowe became their agent.

His whole efforts and services were due to Chapin and Neville, and the fact that unknown to them, he had a confidential relationship with Wilfley and Gee, would debar him from recovering any commission for services against Chapin and Neville.

The duty of a broker employed by a vendor, is not only to secure a purchaser, but to get the best possible price for his employer, and this duty is inconsistent with any confid-

ential relationship between himself and the other side.

The principle is well stated as follows:

> "Where an agent has acted for both parties to a contract, he cannot recover compensation from one of them to whom the double agency was unknown."

The decisions go even farther, and hold that an agent cannot claim remuneration from either party unless it is clearly shown that both parties knew and assented to the agreement.

1 Am. and Eng. Law, 2d Ed., 1113.

Robbins v. Sears, 23 F., 875.

VIII.

The claim against the estate was presented on December 10, 1900, and this action was commenced on January 25, 1901. The parties stipulated upon the trial as to the dates that payments of purchase price were made. So as to those facts the condition of the bill of exceptions is immaterial. It appears by such stipulation (page 53) that on December 10, 1900, when the claim was presented to the administrator, only $10,000. had been paid to him, and that between such time and the commencement of the suit, an additional $5,000. and no more had been paid to him. At the times when the claim was presented and the suit was commenced the purchaser was under no obligation to make any further payments. This is not

denied. Crowe's right to recover, if any existed, was entirely contingent upon Wilfley paying the remaining portion of the purchase price. His claim against the estate was not even an absolute claim that was not due. It was a claim that was both contingent and undue.

The fact that since the commencement of the actions the facts have happened which turn this contingent right into an absolute one, can have no bearing whatever upon the right of the plaintiff to recover in these actions.

The complaint to be good must show a cause of action in favor of the plaintiff and against the defendant at the time the action is commenced. The complaint relates to the time of the commencement of the action, and the rights of the plaintiff are to be determined as they existed when suit was commenced.

4 Ency. Pl. & Pr. p. 605.

This rule is elementary and unqualified.

Maynard v. Talcott ,11 Barb., 569.

McGrane v. Elevated R. R. Co., 73 N. Y. S., 506.

It cannot be contended that there is anything in the Arizona statute which provides for the adjudication of a contingent or undue claim by suit against the estate of a decedent. It is true that the Revisd Statutes of 1887, which were in operation when this suit was brought, provide that "all claims arising

upon contracts hereafter made, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever." (Paragraph 1110..)

It was thus necessary for the claimant to present his claim, but this did not give him the right to sue upon it unless it were both absolute and due. The statute further says:

"If the claim be not due when presented, or be contingent the particulars of such claim must be stated." The plaintiff failed to comply with this provision.

The procedure of the plaintiff in such a case as this is especially provided for. Paragraph 1115 reads as follows:

> "When a claim is rejected either by the executor or the administrator, or the Probate Judge, the holder must bring suit in the proper court against the executor or administrator within three months after date of its rejection if it be then due, or within two months after it becomes due. Otherwise the claim is forever barred."

It was the plain duty of the plaintiff under the law and the statute to wait until his contingent claim should have become an absolute one through the payment of the purchase price by Wilfley, and then to commence his suit within two months thereafter.

Section 1121 of the statutes providing that a judgment against an executor or an administrator only establishes the claim in the same manner as if it had been allowed by the executor, and that the "judgment must be that the executor pay in due course of administration the amount ascertained to be due," upon its face, applies only to such claims as are due. In any event, therefore, the judgment of the District Court was erroneous and should have been reversed.

IX.

The judgment of the Supreme Court of the Territory should be affirmed.

Dated Tucson, Arizona, October 27th, 1906.

EUGENE S. IVES,
Counsel for Appellee.

Supreme Court of the United States.

No. 71.—October Term, 1906.

George W. Crowe, Appellant,
vs.
M. M. Trickey, Administrator of the Estate of Norman H. Chapin, deceased.
} Appeal from the Supreme Court of the Territory of Arizona.

[January 21, 1907.]

This was an action brought by Crowe in the District Court of Santa Cruz County, Arizona, against Trickey, administrator of the estate of N. H. Chapin, deceased, to recover the sum of five thousand dollars as commission on a sale alleged to have been effected by Crowe for Chapin, during his life, of a one-fourth interest in a mine. The case was tried by the District Court without a jury, a jury having been waived by agreement of the parties, and that court made findings of fact and stated conclusions of law therefrom, upon which it rendered judgment in Crowe's favor, January 10, 1902, to be paid in due course of administration. From that judgment the case was carried by appeal to the Supreme Court of the Territory of Arizona, which, March 20, 1903, reversed the judgment, and remanded the case to the District Court, with directions to render judgment for defendant. 71 Pac. Rep. 965.

The record states:

"In the above entitled action the Supreme Court finds the facts to be as follows:

"I. Previous to March, 1899, a mine known as the Pride of the West Mine was owned by three parties. A man named Olsen owned one-half thereof, and Norman H. Chapin, the defendant's intestate, and Jerry Neville each owned one-fourth interest therein.

"In March, 1899, the plaintiff Crowe brought this mine to the attention of one Emerson Gee and his associate A. R. Wilfley. Subsequently, in the latter part of March, 1899, Wilfley purchased Olsen's one-half interest, and made an agreement with Chapin and Neville, in pursuance whereof a deed to the remaining one-half interest was executed by Chapin and Neville, and placed in escrow, the terms of the escrow agreement providing that the deed was to be delivered to Wilfley upon the payment by him of the sum of $100,000 in cash, on or before the 1st day of April, 1900.

"II. It was verbally agreed between Crowe on the one part, and Chapin on the other, representing himself and Neville, that Crowe was to receive ten per cent of the purchase money received by them for their interest in the mine, as commission for making the sale. Such deed and escrow

agreement were executed by Chapin and Neville on the 1st day of April, 1899.

"III. Prior to the 1st day of April, 1900, Chapin and Neville both died.

"M. M. Trickey was appointed administrator of Chapin's estate and one Henry H. Harmon was appointed administrator of Jerry Neville's estate.

"Wilfley failed to pay the money and take the property under his option, and after the 1st day of April, 1900, at the expiration of the time mentioned in the escrow agreement, and in accordance with the terms thereof, the deed in escrow was returned to Trickey, the administrator of Chapin's estate.

"IV. Thereafter, and on the 7th day of April, 1900, upon the payment of $1,000 by Wilfley, the administrators of these two estates made another agreement with Wilfley, by the terms of which they agreed to execute a deed to a one-half interest owned by the two estates, upon the payment of the purchase price of $100,000, in specific amounts, on different dates therein expressed. This option also lapsed.

"V. After said lapse, and on the 19th day of June, 1900, M. M. Trickey, as administrator of the estate of Chapin, entered into another agreement, which was offered in evidence by the plaintiff, and appears in the bill of of exceptions as 'Exhibit 3.'

"By this agreement, Trickey as administrator, gave to Wilfley an option to purchase the one-fourth interest in the mine owned by the estate of Chapin, and obligated himself to execute to Wilfley a deed for such interest upon the payment of $5,000 in cash, $5,000 within three months; the further sum of $5,000 within six months; the further sum of $5,000 within nine months; the further sum of $5,000 within twelve months; and the further sum of $25,000 within eighteen months.

"The plaintiff Crowe had nothing whatever to do with either of the last mentioned options, or with the sale of the property after the death of Chapin.

"VI. In pursuance to this option, Wilfley paid to Trickey the sum of $5,000 in cash on the 19th day of June, 1900; and the following sums on the following dates, respectively: $5,000 on September 19, 1900; $5,000 on December 19, 1900; $5,000 on March 20, 1901; $5,000 on June 17, 1901; $25,000 on December 7, 1901.

"VII. The above mentioned agreement (Exhibit 3) was only an option to purchase, and under it there was no obligation on the part of Wilfley to pay any portion of the purchase price, and no obligation on the part of Trickey to deliver the deed mentioned in the agreement until the last payment of $25,000 in December, 1901, had been made.

"VIII. On the 10th day of December, 1900, Crowe presented to Trickey, as administrator of Chapin's estate, in accordance with the law of the Territory of Arizona, his claim against the estate of Chapin for 'Ten per cent. of the purchase price of the Pride of the West Mine, agreement for the sale of which was entered into about April 1st, 1899, and which said agreement of sale was made by Chapin and Neville to A. R. Wilfley, and which sale was brought about by the said George W. Crowe, upon the agreement that he was to receive ten per cent commission upon said purchase price from said Chapin and Neville, one-half of said ten per cent being $5,000.'

"IX. This claim was rejected by the administrator, and he thereupon brought this action in the District Court of Santa Cruz County on the 25th day of January, 1901, at which time the estate of N. H. Chapin, deceased, was solvent, and amply able to pay all debts of the said estate, and the said Chapin nor the said Trickey nor any one else had paid to the plaintiff the said sum of $5,000, or any part thereof, or anything on account thereof.

"The case was tried before the court, without a jury, a jury having been by agreement of parties waived, and the court made the following findings of fact:

[Here follow findings of fact and conclusions of law by the District Court, upon which judgment was rendered in favor of the plaintiff, and an appeal prayed therefrom to the Supreme Court as stated.]

"The only statements of fact in the record were contained in the foregoing findings of fact, and in a bill of exceptions. The said bill of exceptions, which was transmitted to the Supreme Court of Arizona with the record in this case, did not state that it contained all of the evidence which was introduced upon the trial of the case in the District Court, nor upon the points presented to the Arizona Supreme Court for its decision, nor does it otherwise appear from the record in the case that all of the evidence which was introduced upon the trial of the case in the District Court was before the said Supreme Court of Arizona. The abstract of the transcript which contained the evidence stated that 'the defendant by his bill of exceptions, which contained all the evidence taken on said trial, and which is as follows:' then follows the bill of exceptions reciting the testimony of the different witnesses, covering some 23 pages, and at the conclusion thereof the following allowance:

'The foregoing bill of exceptions was presented to me for allowance on the 24th day of January, 1902, and was by me on the same date submitted to Messrs Hereford & Hazzard, attorneys for the opposite party, who made no objection thereto, whereupon the said bill of exceptions is now by me signed, approved and allowed as of the said 24th day of January, 1902. Geo. R. Davis, Judge,' but the record contains no certificate from the clerk or court that the evidence contained in the bill of exceptions constituted all of the evidence taken on the trial in the lower court, and that fact is controverted by the counsel for the appellee.

"The Arizona Supreme Court found the following facts:

"I. That the efforts of the plaintiff Crowe resulted in procuring the purchaser Wilfley not to purchase absolutely, but to take an option on the purchase of the property involved, for one hundred thousand dollars; that Crowe's principals accepted a deed to the property and placed it in escrow; that although Chapin died before the expiration of that escrow agreement, the deed executed by him remained subject to the order of the purchaser, and that if he had availed himself of the terms of that agreement, the sale would have been completed and plaintiff Crowe would have been entitled to his commission, but that Wilfley failed to make the payment and take up the deed, and, after the expiration of the option and after Chapin's death, the deed was returned to the administrator of Chapin's estate and the transaction was closed without any sale being made.

"II. That the sale of the property that was subsequently effected was the result of the negotiations between Trickey, the administrator of Chapin's estate, and Wilfley; that before the date of the sale, Crowe's power or authority to act in the matter had been terminated, and his agency revoked by the death of Chapin.

"III. That in regard to the latter negotiations, Crowe rendered no services to Trickey, received no appointment or agreement from Trickey in reference to the matter, and took no part whatever in the ultimate sale.

"IV. That the plaintiff Crowe did not, between the 8th day of February, 1898, and the 11th day of January, 1900, bring about a sale of Chapin's interest in the property in controversy.

"V. The said A. R. Wilfley paid to the said defendant the sum of fifty thousand dollars, as follows; April 7, 1900, five hundred dollars; June 19, 1900, four thousand five hundred dollars; September 19, 1900, five thousand dollars; December 19, 1900, five thousand dollars; March 20, 1901, five thousand dollars; June 17, 1901, five thousand dollars; December 7, 1901, twenty-five thousand dollars, not for the right, title and interest of the said Norman H. Chapin but for the 'right, title and interest of the said estate of Norman H. Chapin, deceased, in and to' the said property, in compliance with the terms of the contract of sale and title bond executed to the said Wilfley by Trickey, the administrator of said estate."

[Here follow conclusions of law and judgment.]

Mr. Chief Justice FULLER delivered the opinion of the Court:

The Supreme Court of the Territory was called upon to make a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court in the admission or rejection of evidence when excepted to. Our jurisdiction is limited to the consideration of such exceptions and to determining whether the findings of fact support the judgment. *Harrison* v. *Perea*, 168 U. S. 311; *Young* v. *Amy*, 171 U. S. 179.

The statement of facts required by the statute should present clearly and precisely the ultimate facts. And while it may be objected to the statement in this case that it does not properly comply with that rule, for it is quite confused and gives a mass of unnecessary details, yet we think the imperfections in that regard should not be held fatal as a sufficient statement finally emerges. This will be understood by reference to the statement itself, which we have set forth for that purpose.

The bill of exceptions contains some minor rulings on questions propounded to witnesses, but the exceptions thereto were not insisted upon in the Supreme Court nor considered by that tribunal, so that the question before us is whether the findings of fact support the judgment.

But several of the errors assigned are to the effect that the Supreme Court erred in considering or determining the case upon questions of fact, because the bill of exceptions failed to state that it contained all of the evidence given in the case, and the record failed "to show that the bill of

exceptions contains all of the evidence given in the case, or all of the evidence bearing upon the questions involved in the decision" of the court.

The Supreme Court proceeded upon the record as containing all the evidence and we are not inclined to hold that the contention that it should not have done so is open to our consideration under the limitations of the statute. But, be that as it may, we think the record shows that all the evidence was contained in the bill of exceptions and that that is sufficient, even though the bill itself did not so state in express terms. *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255.

Paragraphs 1485 and 1582 of the Revised Statutes of Arizona, 1901, (pp. 461, 474,) provide:

"Every paper filed in a case shall constitute a part of the record of the case, including depositions and all written evidence and exhibits offered or admitted in evidence; and no papers thus filed or admitted in evidence, or offered in evidence and rejected by the court, need be incorporated in a statement of facts in order to make it a part of the record."

"On taking an appeal . . . the appellant . . . shall cause to be filed in the Supreme Court . . . the original record of the case, together with a copy of all minute entries made in the case, the same to be certified to by the clerk of the District Court, with the seal of the court affixed, that it contains a true copy of all minute entries made in the case, and that the papers thereunto attached are all the papers constituting the record of the case. . . ."

The clerk accordingly transmitted to the Supreme Court all of the original records and copies of the minute entries. The case, coming on for hearing, the minute entries state:

"The trial then proceeded upon the pleadings herein, in the presence of and before the court sitting without a jury, a jury having been expressly waived in open court by both parties hereto, and the plaintiff to maintain upon his part the issues herein, introduced certain documentary evidence, and also called as a witness the following named person, to wit, George W. Crowe, the plaintiff, who was duly sworn, examined and cross-examined, and thereupon the plaintiff rested his case. The defendant then, to maintain upon his part the issues herein, called as a witness the following named person, to wit, M. M. Trickey, who was duly sworn, examined and cross-examined, and thereupon the defendant rested his case. The evidence being now adduced and the case closed, arguments of the respective counsel followed, and the cause being now fully submitted, the same was by the court taken under advisement."

The evidence of two witnesses, Wilfley and Gee, was taken by deposition, and their depositions were sent up in the transcript. The minute entries show that only two witnesses, Crowe and Trickey, administrator, were examined before the court, and their testimony is given in narrative form in the bill of exceptions, as well as the testimony of Wilfley and Gee. The minute entries, in speaking of the introduction of "documentary

evidence," were manifestly intended to embrace depositions in that term. There is no room for presuming that any evidence was omitted, and the points to which the evidence adduced was addressed preclude such a suggestion.

We are brought then to the question of the sufficiency of the facts found to support the judgment. The findings may be summarized as follows:

Chapin and Neville each owned one-fourth of the mine, and on April 1, 1899, signed a paper addressed to the Consolidated National Bank of Tuscon, Arizona, which is contained in the bill of exceptions, and, by reference, in the statement of facts, and was couched in these terms:

"GENTLEMEN: The enclosed deed from N. H. Chapin, Marie Chapin, Jerry Neville and Refugia Neville, parties of the first part, to Arthur R. Wilfley, party of the second part, is to be delivered to the said Arthur R. Wilfley upon the payment of the sum of one hundred thousand dollars at or before the expiration of one year from the date hereof.

"And you are further directed that all moneys sent you from time to time by the said Arthur R. Wilfley, with instructions to apply the same to the payment of the aforesaid purchase money, shall be so applied and the same placed to the credit of N. H. Chapin and Jerry Neville.

"Therefore, if the said Arthur R. Wilfley shall pay or cause to be paid the sum of money above mentioned, at or before the time aforesaid, you will then deliver the said deed to the said A. R. Wilfley, his agent or assigns. Otherwise the said deed is to be held subject to the order of the said N. H. Chapin and Jerry Neville.

"Dated Washington, Arizona, April 1st, 1899."

This paper and the deed therein mentioned were deposited in escrow in the bank on that day.

The terms of the transaction had been arranged the latter part of March, and it was verbally agreed that Crowe should receive ten per cent commission on the purchase money received by Chapin and Neville.

Chapin died January 11, 1900, and Trickey was appointed administrator February 8, 1900, and qualified as such. Neville died January 3, 1900, and Harmon was appointed administrator and qualified as such.

Wilfley failed to pay the money and take the property, and after the expiration of the time mentioned in the escrow agreement the deed in escrow was returned to Trickey, administrator.

On April 7, 1900, the administrators of the two estates made an agreement with Wilfley to execute a deed to the half interest on payment of $100,000, in amounts prescribed.. This option also expired. Thereafter, and on the 19th of June, 1900, Trickey, as administrator of the estate of Chapin, entered into an agreement with Wilfley to convey to him the right, title and interest of the estate of Chapin in the mining property (described as a quarter interest), on payment of $50,000, in designated amounts, and these payments were subsequently made.

Crowe had nothing whatever to do with either of the last-mentioned options, or with the sale of the property after the death of Chapin.

And the claim he presented to Trickey as administrator of Chapin's estate was for $5,000, being one-half of the commission agreed to be paid to him in March, 1899, on the purchase price which would have been received by Chapin and Neville if the option of April 1, 1899, had been carried out.

In these circumstances we concur in the judgment of the Supreme Court of the Territory.

In *McGavock* v. *Woodlief*, 20 How. 221, it was laid down that in order to be entitled to commission "the broker must complete the sale, that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on." But this rule is inapplicable when the owner refuses, without sufficient reasons, to fulfill the agreement which the agent has made. *Kock* v. *Emmerling*, 22 How. 69. Even though he could not have been compelled to carry out his contract if he had chosen to set up the statute of frauds. *Holden* v. *Starks*, 159 Mass. 503. Or when the agent's authority is revoked in bad faith before the completion of the sale. *Sibbald* v. *Bethlehem Iron Company*, 83 N. Y. 378. In this case the subject was much considered, and Finch, J., in delivering the opinion of the court, said, among other things:

"It is the established rule that a broker is never entitled to commissions for unsuccessful efforts. . . . The broker may devote his time and expend his money with ever so much devotion to the interest of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions, and in such event it matters not that after his failure and the termination of his agency, what he has done proves of use and benefit to the principal. He may have introduced to each other parties who otherwise would have never met. He may have created impressions which under later and more favorable circumstances naturally lead to, and materially assist in, the consummation of a sale. . . . This, however, must be taken with one important and necessary limitation. If the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing and consenting to the prescribed terms, is produced; or if the latter declines to complete the contract because of some defect of title in the ownership of the seller, some unremoved incumbrance, some defect which is the fault of the latter, then the broker does not lose his commissions. . . . One other principle applicable to such a contract as existed in the present case needs to be kept in view. Where no time for the continuance of the contract is fixed, by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But, having been granted him, the right

of his principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. . . .

"If, after the broker has been allowed a reasonable time within which to produce a buyer and effect a sale, he has failed to do so, and the seller in good faith and fairly has terminated the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions, because the purchaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts."

In the present case what Crowe had obtained was not an absolute contract of purchase, but an option on the purchase.

The deaths of Chapin and Neville terminated the authority of Crowe to sell on commission, which was not a power coupled with an interest, that is, an interest in the property on which the power was to operate. *Hunt* v. *Rousmanier*, 8 Wheat. 174; *Walker* v. *Walker*, 125 U. S. 339.

Nevertheless, up to the first of April, 1900, if Wilfley had availed himself of the terms of the escrow agreement, the sale might have been completed and Crowe have been entitled to his commission, but Wilfley did not do so, and the deed held in escrow was returned in accordance with the terms of that agreement.

There is no legal basis for the imputation of bad faith, and it is not pretended that Crowe was employed by Trickey or rendered any service to him in the matter of the sale. The bare fact that what he had done in the former negotiations may have contributed to the accomplishment of the sale by Trickey is not enough to sustain his claim for the commission sued for.

Judgment affirmed.

No. 70.

George W. Crowe, Appellant,
vs.
Henry Harmon, Administrator of the Estate of Jerry Neville, deceased.

Appeal from the Supreme Court of the Territory of Arizona.

MR. CHIEF JUSTICE FULLER: This case is identical in all essential respects with that just decided, and must take the same course.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.